UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

MORRIS RICHARDSON D/B/A LATTA ROAD NURSING HOME AND MORRIS RICHARDSON D/B/A LATTA ROAD NURSING HOME A,

Employer

Case No. 3-RD-1590

-and-

VIRGINIA K. MILLER

Petitioner

-and-

1199 SEIU HEALTHCARE WORKERS EAST,

Union

EMPLOYER'S STATEMENT IN OPPOSITION TO THE UNION'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND CERTIFICATION OF THE RESULTS OF THE ELECTION

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PRELIMINARY STATEMENT

Morris Richardson d/b/a Latta Road Nursing Home and Latta Road Nursing Home A ("Latta Road" or "Employer") submits this Statement in Opposition to 1199 SEIU Healthcare Workers East's (the "Union") Request for Board Review of the Regional Director's Supplemental Decision and Certification of Election ("Decision") issued on December 12, 2011. The Union's Request for Review ("Request") pursuant to Sections 102.67(c)(1) or (2) of the Board's Rules and Regulations should be denied because there is no "compelling reason" for the Board to review the Decision.

The Regional Director's legal analysis and discussion is consistent with governing Board law, and the Union has not and cannot show that the Decision is clearly erroneous on a "substantial factual issue." The Union's Request misstates facts and evidence, cites to Board law that is inconsistent with the propositions advanced in its arguments, and relies upon hearsay assertions contained in its objections that were not substantiated by testimony or any other evidence at the hearing. Accordingly, the Union's Request should be denied.

ARGUMENT

Pursuant to Board Rule 102.67(c), "[t]he Board will grant a request for review only where compelling reasons exist therefor." 29 C.F.R. § 102.67(c)(emphasis added). Rule 102.67 sets forth only four grounds that constitute compelling reasons for review:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. § 102.67(c). Applying this standard and considering the record evidence in this proceeding, there is no "compelling reason" for the Board to review the Regional Director's Decision, and the Union's Request for Review should be denied.

Although the Union makes a perfunctory reference to Board Rule 102.67(c) in the opening paragraph of its Request for Review, it is not clear which of the four exclusive "compelling reasons" it asserts to justify Board review of the Regional Director's Decision. It appears, however, that the Union's first challenge is brought under Board Rule 102.67(c)(2), and asserts that the Regional Director's determinations, first, that the Employer's observer, Sandra Jackson, was not a supervisor or person closely aligned with management and, second, that she did not claim to be a supervisor or possess the power to hire and fire at the pre-election conference, were clearly erroneous. It appears that the Union's second challenge is brought under Board Rule 102.67(c)(1) and asserts that the Regional Director failed to follow established Board precedent concerning the "secrecy" of the balloting.

At the outset, however, the Board should note that the Union's Request for Review fails to comply with the requirements of Board Rule 102.67(d) which demands

that any challenge involving a "substantial factual issue" under Board Rule 102.67(c)(2), or other grounds as appropriate, contain a summary of all evidence or rulings bearing on the issues, together with page citations from the transcript and a summary of argument. 29 C.F.R. § 102.67(d). The Union's Request does not contain a single citation to the transcript or hearing exhibits upon which the Hearing Officer's Report on Objections and the Regional Director's Decision were based. This obvious departure from the Board's rules is sufficient reason alone to deny the Union's Request for Review. More importantly, it simply confirms that the record contains no evidentiary support for the Union's arguments. Both the Hearing Officer and the Regional Director observed that the Union relied on allegations for which there was no supporting proof in the record. (Decision, p. 4-6; HOR, p. 10-11, 17). Surely, if there was any evidence in the record to support the Union's factual contentions, the Union would have cited to that evidence in its Request for Review. That the Union failed to do so is best viewed as a tacit admission that there is no evidence in the record to support its contentions.

POINT ONE

THE REGIONAL DIRECTOR'S DECISION THAT SANDRA JACKSON IS NOT A SUPERVISOR OR CLEARLY ALIGNED WITH MANAGEMENT IS SUPPORTED BY THE RECORD EVIDENCE AND IS NOT CLEARLY ERRONEOUS

In its Request, the Union appears to argue that the Regional Director clearly erred on a substantial factual issue in finding that Sandra Jackson was not a supervisor and was not closely identified with management. (Request, p. 3). In the "Facts" Section

¹ References to the official transcript of the October 4, 2011 Hearing On Objections will be referenced as Tr. ___, and references to the Hearing Officer's Report on Objections related to this hearing will be referenced as HOR, p.

of its Request, the Union claims, without citing supporting evidence from the record, that "the election was observed by a supervisor [Jackson] who is closely identified with the employer." (Request, p. 2).

The Union's unsupported contention that Sandra Jackson is a supervisor is troubling, because, at the hearing, the Union presented no evidence, and conceded that it did not intend to produce evidence, that Sandra Jackson was a supervisor. (Decision, p. 3; HOR, p. 9, Tr. 11-13, 41-42, 53-54, 103). The record evidence, which includes Sandra Jackson's testimony that she is not a supervisor, evidence that she is and at all times has been a therapy aide (a position included in the bargaining unit), and evidence that she voted in the decertification election without challenge by the Union, clearly supports the Regional Director's decision to adopt the Hearing Officer's finding that Sandra Jackson is not a supervisor. (Decision, p. 3; HOR, p. 9-11; Tr. 41-42, 53-54, 68, 74, 102-03). There is no evidence in the record to contradict the Regional Director's Decision that Sandra Jackson is not a supervisor; therefore, the Union cannot show that this determination is clearly erroneous.

The Union's contention that Sandra Jackson is a supervisor or someone closely aligned with management is based solely on disputed testimony that, during the pre-election conference, Sandra Jackson said that she was a supervisor in response to questions posed by a Board agent. (Decision, p. 3-4; Request, p. 3-5; HOR, p. 9-11). The Hearing Officer resolved this disputed factual issue against the Union based, in part, on his credibility assessment of the witnesses, and the Regional Director correctly confirmed that assessment. (HOR, p. 10-11; Decision, p. 3-4).

In its Request for Review, the Union asserts that the Hearing Officer failed to sufficiently set forth reasons for his credibility assessments, and, therefore, that the Regional Director's reliance on his findings was erroneous. (Request, p. 3-5). To the contrary, the Hearing Officer explained the basis for his credibility determinations, and the Regional Director was right to rely upon his assessment of the witnesses. (HOR, p. 10-11; Decision, p. 3-5). Ironically, the case cited by the Union to support its argument that the Hearing Officer's explanation for his credibility assessments is inadequate, *Bishop and Malco*, 159 NLRB 1159, 1161 (1966), stands for precisely the opposite proposition. That case confirms that the Hearing Officer gave sufficient reasons for his credibility findings and that he was not required to detail all the factors he considered in resolving conflicts in the testimony. (*Id.;* Decision, p. 3-4; HOR, fn. 4).

The Union also attacked the hearing officer's credibility determinations by asserting that the Hearing Officer and the Regional Director improperly credited the testimony of David Morton, over the Union's witnesses, because David Morton "was not in the room at the time Ms. Jackson identified herself as a supervisory authority." (Request, p. 5). Yet, only one page earlier in its Request for Review, the Union admits that David Morton was present during the pre-election conference. (Request, p. 4). Furthermore, the record (which the Union has ignored in its Request for Review) clearly shows that David Morton was present at the pre-election conference when Sandra Jackson was questioned by the Board agent. (Tr. 70, 90-91). In summary, the Regional Director's factual findings underlying his determination that Sandra Jackson is not a supervisor or someone closely aligned with management are not clearly

erroneous, and that determination is fully supported by the record evidence and applicable Board law.

Even assuming that Sandra Jackson said she was a supervisor at the preelection conference, the Regional Director properly rejected the Union's challenge on this basis because there is no other record evidence that Sandra Jackson was, in fact, a supervisor or someone closely aligned with management. (Decision, p. 4; HOR, p. 10-11). It is settled Board law that rank-and-file employees cannot be transformed into supervisors merely by claiming that status. *Carlisle Engineered Products, Inc.*, 330 NLRB 1359, 1360 (2000); *NLRB v. Wilson-Crissman Cadillac*, 659 F.2d 728, 730 (6th Cir. 1981); *Hallandale Rehabilitation Center*, 313 NLRB 835, 836 (1994); *Transit Co.*, 114 NLRB 617, 618-619 (1955).

In Carlisle Engineered Products, Inc., supra, the Board found that written disciplinary warnings referring to a particular employee as a "supervisor" were insufficient to prove that the employee was a supervisor. Reversing the Hearing Officer's finding of supervisory status, the Board observed:

It is well established that rank-and-file employees cannot be transformed into supervisors merely by being invested with that title; rather, an individual's actual powers, duties and responsibilities control.

Carlisle, 330 NLRB at 1360 (citing NLRB v. Wilson-Crissman Cadillac, 659 F.2d 728, 730 (6th Cir. 1981); Hallandale Rehabilitation Center, 313 NLRB 835, 836 (1994); Transit Co., 114 NLRB 617, 618-619 (1955)). The same observation holds true here. The Union failed to offer any proof: (a) that Sandra Jackson possessed and exercised supervisory powers, duties and responsibilities, or (b) that she was, or that anyone perceived her as being, "closely aligned with management." (Decision, p. 4; HOR p. 10-

11). This failure of proof is underscored by the Union's attempt to support its Request for Review with a hearsay statement alleged in its objections – a hearsay statement that was not substantiated by testimony or by any other evidence admitted at the hearing. (Request, p. 5; Decision, p. 4; HOR, p. 3, 5; Tr. 62-63, 109). Specifically, in its Request for Review, the Union asserts that Ms. Jackson "demonstrably interfered with the election as she influenced at least one employee to vote against the Union." (Request, p. 5). This assertion was disregarded by the Hearing Officer and characterized as inherently unreliable by the Regional Director, because there is nothing in the record to support it. (Decision, p. 4; HOR, p. 3, 9-11). The Union's challenge to Sandra Jackson's supervisory status is based on speculation, not proof, and was correctly rejected by both the Hearing Officer and the Regional Director. The Union has failed to demonstrate any "compelling reason" to review the Regional director's decision on this issue.

POINT TWO

THE REGIONAL DIRECTOR CORRECTLY APPLIED BOARD PRECEDENT TO THE RECORD EVIDENCE IN FINDING THAT THE REMOVAL OF AN EMPLOYER-OWNED SCREEN FROM THE VOTING AREA DID NOT SUPPORT OVERTURNING THE ELECTION

Without citing to any evidence from the hearing, the Union contends that the removal of a screen that was not part of the standard Board tabletop voting booth "allowed the observers to see the voters as they were voting and allowed the observers to see the ballots before they were placed in the ballot box." (Request, p. 6). In its Request for Review, the Union misstates the Regional Director's analysis of this issue

by suggesting that the Regional Director found that the "ability of observers to see voters' choice is of no consequence, in direct contravention of Board precedent." (Request, p. 7). To the contrary, the Regional Director's Decision addresses the important distinction between evidence that the ballot could be seen in the voters' hands as they walk to the ballot box and evidence that the voters' choices on those ballots were actually observed. (Decision, p. 5). Board precedent is clear that an election will not be set aside under the *Polymers*, *Inc.* standard (*Polymers*, *Inc.*, 174 NLRB 282 (1969)), the standard advanced by the Union in support of its argument, absent evidence that someone actually witnessed how a voter marked his or her ballot. *See American Medical Response*, 356 NLRB No. 42 (2010), *citing Avante at Boca Raton*, 323 NLRB 555, 558 (1997).

The Union does not cite to any evidence in the record to suggest that the secrecy of any ballot was compromised. Again, the Union relies on matters outside the record to support this contention. (Request, p. 6; HOR, p. 3, 17). Specifically, the Union cites to allegations in its objections that an employee, who did not testify at the hearing, "felt that Sandra Jackson [an observer] was looking at her in a sharp manner and that Sandra Jackson could see her voting." (Request, p. 6; HOR, p. 3, 17). This contention is based on conjecture, not admissible proof, and should be rejected for that reason alone. Furthermore, this unproven hearsay statement does not state that Sandra Jackson actually saw how this employee marked her ballot. The Union presented no evidence at the hearing that the selection on any voters' ballot was seen; therefore, the Regional Director's Decision rejecting the Union's contention that the secrecy of the ballot was compromised is fully consistent with established Board law. Indeed, the

Regional Director's Decision is supported by the very decision that the Union cites in support of its argument. (Decision, p. 5; HOR, p. 13-14; American Medical Response,

356 NLRB No. 42, p. 2 (2010)).

Finally, the Union contends that the reconstruction of the standard Board voting

booth at the hearing "may not have been accurate." (Request, p. 6-7). The Union,

however, did not object to the reconstruction of the booth by Board Agent Nicole

Roberts at the hearing (Tr. 47-51, 87-88), nor did it offer any evidence to challenge the

accuracy of that reconstruction. The Union's arguments relating to the secrecy of the

ballot and the reconstruction of the voting booth are without merit, and the Union's

Request for Review should be denied.

CONCLUSION

The Regional Director's Decision is consistent with applicable Board precedent

and supported by the record evidence presented at the hearing. The Union has failed

to establish that there is any "compelling reason" to review the Regional Director's

Decision; therefore, the Union's Request for Review should be denied.

Dated: January 3, 2012

Rochester, New York

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, January 3, 2012, a true and accurate copy of the foregoing document was electronically filed through the National Labor Relations Board's electronic filing system and that a copy was served upon the following individuals by email:

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And, I hereby certify that on January 3, 2012, pro se Petitioner Virginia K. Miller was notified of the substance of the foregoing document over the telephone at (585) 225-0910 ext. 310, and was served a copy of the foregoing by overnight mail at:

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Dated: January 3, 2012

Rochester, New York

James Holahan